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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Establishment of a Class A	)	MM Docket No. 00–10
Television Service	)	MM Docket No. 99-292
	)	
	)	

COMMENTS OF K LICENSEE INC.

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, K Licensee Inc. ("K Licensee"), the licensee of low-power television station WEBR(LP), Manhattan, New York, by its attorneys hereby submits its comments in response to the Notice of Proposed Rulemaking ("*Notice*") in the above-referenced proceeding.[1] The Commission's *Notice* seeks to implement the Community Broadcasters Protection Act ("CBPA"),[2] enacted by Congress on November 29, 1999. CBPA requires the Commission to prescribe regulations establishing a "Class A" television service granting Class A licensees the same license terms and renewal standards as full-power licensees and according them primary status as a broadcaster. K Licensee limits the scope of its comments in this proceeding to two critical CBPA

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[1] Establishment of a Class A Television Service, *Order and Notice of Proposed Rulemaking* in MM Docket No. 00-10 (rel. January 13, 2000).

[2] Community Broadcasters Protection Act of 1999, Section 5008 of Pub. L. No. 106-113, 113 Stat. 1501 (1999) (to be codified at 47 U.S.C.§ 336).

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implementation issues which potentially affect WEBR(LP)'s ability to obtain a Class A license: (1) the interpretation of "interference" in Section 5008(f)(7)(B) of CBPA; and (2) the interpretation of the New York City Channel 16 land mobile radio interference protections in Section 5008(f)(7)(C)(ii) of CBPA.

I. INTRODUCTION

WEBR(LP) is the only free and universally available Korean-language television station serving the New York City metropolitan area. WEBR(LP)'s programming is broadcast twenty-four hours per day, seven days per week, and includes locally-produced Korean-language public-interest programming, locally-produced Korean-language local and international news, a locally-produced live call-in program, and other imported Korean-language programming such as children's programs, daytime dramas, game shows, and current affairs programs. WEBR(LP) provides this valuable and unique programming to over 10 million people throughout the New York metropolitan area, including areas of New Jersey, and is a critical source of news and information for the nearly half-million Korean Americans in this area.

When Congress enacted the Community Broadcasters Protection Act, it recognized the importance of low-power television ("LPTV") stations such as WEBR(LP). A primary purpose for creating a new Class A license was to bring certainty to the future of such stations and, thereby, to assist such stations in attracting the necessary capital. Congress believed that certain LPTV stations, such as WEBR(LP), were worthy of these protective measures because of the unique role such stations play in the local video marketplace. As Senator Moynihan, a member of the Senate Conference Committee on CBPA, stated, WEBR(LP) "exemplifies exactly

the type of low power station that should have the opportunity to achieve Class A status."[3] He added, "[t]his station's worthwhile service to the community has been a benefit to the public good, and this legislation should not thwart such service from continuing."[4]

Additionally, the Conference Report recognized that urban LPTV stations typically provide niche programming (*e.g.*, bilingual or non-English programming) to under-served communities and that this contribution is of utmost importance for urban communities saturated with "an over-abundance of national programming."[5] In the sea of New York City's homogeneous national broadcast television programming, WEBR(LP) shines as a beacon of thoughtful targeted news, entertainment, and cultural programming serving one of the largest Korean-American communities in the country. Based on its programming and purpose, it should go without saying that WEBR(LP) is "eligible" for a Class A license under CBPA.[6]

Under CBPA, an LPTV station may qualify for Class A status if it broadcasts three hours per week of locally-produced programming.[7] WEBR(LP) broadcasts nearly three

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[3] CONG. REC. S14989 (November 19, 1999), attached hereto as Exhibit A.

[4] *Id.*

[5] H.R. CONF. REP. NO. 106-464, at 150 (1999) (Joint Explanatory Statement).

[6] Pursuant to Section 5008(f)(1) of CBPA, and the FCC's Public Notice (Mass Media Bureau Implements Community Broadcasters Protection Act of 1999, *Public Notice* (December 13, 1999)), K Licensee submitted a completed Statement of Eligibility for Class A Low Power Television Station Status on January 28, 2000. In the Statement, K Licensee certified that it: (a) broadcast a minimum of 18 hours per day; (b) broadcast an average of three hours or more per week of locally produced programming; and (c) operated WEBR(LP) in full compliance with Part 74 of the Commission's Rules. *See* Community Broadcasters Protection Act of 1999, Section 5008(f)(2)(A)(i)-(iii) of Pub. L. No. 106-113, 113 Stat. 1501 (1999).

[7] *Id.* § 5008(f)(2)(A)(ii).

hours of locally-produced programming each *day*. However, in order to obtain the new Class A license, three specific statutory interference requirements must be met. The Commission must implement these interference requirements in a manner consistent with Congressional intent and with sensitivity to the impact such implementation will have on deserving stations such as WEBR(LP).[8] The Class A license is the only way for WEBR(LP) to attain protected primary status and to solidify its future role in the community it serves.

II ONLY OBJECTIONABLE LPTV-TO-LPTV INTERFERENCE SHOULD BE A FACTOR IN SECTION 5008(f)(7)(B) DETERMINATIONS

Paragraph 41 of the *Notice* seeks comment on the various CBPA interference protections including Section 5008(f)(7)(B) of CBPA, which prohibits the Commission from granting or modifying a Class A license absent a showing that the Class A station would not cause:

> interference within the protected contour of any licensed LPTV or TV translator station or one authorized by construction permit or one with a pending displacement application submitted before the filing date of a Class A application or modification[9]

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[8] The Supreme Court has repeatedly stated that while the plain language of a statute is a starting point, "it is a familiar rule, that a thing may be within the letter of the statute and yet not within its spirit, nor within the intention of the makers." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975), *quoting Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987), *quoting Kelly v. Robinson*, 479 U.S. 36, 43 (1986) ("[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy"); *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987) (construction must follow the spirit, not the letter, of the law if a literal construction is not within the legislature's intent); *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (plain meaning rule is "rather an axiom of experience than a rule of law," and does not preclude the consideration of a statute's purpose, regardless of its literal language).

[9] Community Broadcasters Protection Act of 1999, Section 5008(f)(7)(B) of Pub. L. No. 106-113, 113 Stat. 1501 (1999).

For purposes of implementing Section 5008(f)(7)(B) of CBPA, the Commission must decide exactly what type of "interference" is to be counted against an applicant LPTV station in processing its application for a Class A license. In this regard, a literal reading of the statute is not helpful. Congress did not define "interference" in CBPA. Moreover, the Commission's Rules applicable to the LPTV service do not define "interference," although the Commission's Rules specify certain LPTV-to-LPTV interference restrictions applicable to existing stations and applicants for new LPTV stations.[10] Accordingly, it is within the Commission's discretion to define "interference" for purposes of implementing new Section 5008(f)(7)(B) of CBPA.

The Commission should define "interference" for purposes of Section 5008(f)(7)(B) to mean only objectionable interference, because, notwithstanding the Commission's rule against LPTV-to-LPTV interference within an LPTV station's protected contour, an applicant for a new LPTV station may propose to locate its station within the interference contour of any existing LPTV station. The Commission grants new LPTV authorizations to applicants who agree to accept such interference. Consequently, there are many instances of existing LPTV stations lawfully causing interference to the protected contours of other LPTV stations, *i.e.*, "licensed interference." The LPTV Branch's policy is to reject any subsequent objections by the new LPTV station to such licensed interference. In other words, the new LPTV station

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[10] *See, e.g.*, 47 C.F.R. § 74.703(a). An applicant for a new LPTV station must "protect existing low power TV and TV translator stations from interference within the protected contour as defined in Section 74.707."

effectively has waived its right to object to such licensed interference. Therefore, such interference is not objectionable.

K Licensee urges the Commission to define the required LPTV-to-LPTV interference showing in accordance with the reasonable expectations and existing interference protection rights of LPTV licensees. A prospective Class A licensee should be required only to show that it will not cause interference which is objectionable within the protected contour of any licensed LPTV or TV translator station or one authorized by construction permit or one with a pending displacement application submitted before the filing date of a Class A application or modification.

This interpretation is consistent with Congressional intent. CBPA was enacted to ensure that "communities across the nation will continue to have access to free, over-the-air low-power television (LPTV) stations, even as full-service television stations proceed with their conversion to digital format."[11] First, Congress made clear its intent not to count permissible interference against LPTV applicants for Class A licenses. Senator Hatch, Chairman of the Conference Committee on CBPA, made clear "the interference that is currently permitted by the Commission is intended to continue."[12] Second, Congress did not intend to exclude a significant

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[11] H.R. CONF. REP. NO. 106-464, at 149 (1999) (Joint Explanatory Statement).

[12] CONG. REC. S14989 (November 19, 1999) (Exhibit A hereto). Although the Senator was referring to the subsequent subsection of the Statute, his remarks are equally applicable to Section 5008(f)(7)(B).

number of existing LPTV stations that are not in violation of the Commission's current LPTV-to-LPTV interference rules.[13] Indeed, a careless interpretation of "interference" by the Commission in this context could have that exclusionary effect. To allow the mere existence of some newer LPTV stations, which have come into existence by accepting interference from pre-existing LPTV stations, to become a barrier for otherwise qualified, pre-existing LPTV stations to attain Class A status, would be contrary to the purpose of CBPA.[14]

III. THE COMMISSION'S PROPOSED INTERPRETATION OF SECTION 5008(f)(7)(C)(ii) IS CORRECT

Paragraph 40 of the *Notice* seeks comment on whether "the requirement to protect channel 16 in the New York metropolitan area applies to WEBR(LP)."[15] The requirement to which the Commission refers is found at Section 5008(f)(7)(C)(ii) of the CBPA:

> NO INTERFERENCE REQUIREMENT.—The Commission may not grant a class A license, nor approve a modification of a class A license, unless the applicant or licensee shows that the class A station for which the license or modification is sought will not cause–
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> * * *
>
> (C) interference within the protected contour of 80 miles from the geographic center of the areas listed in section

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[13] Nothing in the legislative history of CBPA indicates that Congress had such an intent.

[14] The stations most likely to have had an applicant for a new LPTV station locate within their interference contour and accept interference are those stations that have served their viewers over a period of years and exemplify the type of Class A station Congress envisioned. Ironically, the later-locating applicant who agreed to accept interference may very well qualify for Class A status. There is absolutely no basis for favoring new LPTV stations over established stations for Class A status, and such a result would be contrary to Congressional intent.

[15] *Notice* ¶ 40.

22.625(b)(1) or 90.303 of the Commission's regulations (47 C.F.R. 22.625(b)(1) and 90.303) for frequencies in –

(i) the 470-512 megahertz band identified in section 22.621 or 90.303 of such regulations; or

(ii) the 482-488 megahertz band in New York.

The *Notice* refers to the *Order*[16] adopted in 1995, granting public safety land mobile use of Channel 16 in New York City, which stated that, because potential for adjacent channel interference to public safety operations on Channel 16 from LPTV operations on Channel 17 could be eliminated through engineering approaches "that LPTV station W17BM [now WEBR(LP)] has no responsibility to protect land mobile operations on adjacent TV Channel 16 other than from spurious emissions . . . ."[17]

The legislative history of Section 5008(f)(7)(C)(ii) of the CBPA consists of a colloquy between Senator Burns, the sponsor of the Low Power Television legislation, and Senators Moynihan and Hatch. The Section is clarified as follows:

> Mr. BURNS. As the sponsor of the low power television provisions contained in the Intellectual Property and Communications Omnibus Reform Act of 1999, I would like to take this opportunity to clarify one of the provisions. Specifically, I want to ensure that a qualified low power television (LPTV) station in New York City serving the Korean-American community on Channel 17 (WEBR(LP), formerly W17BM) is not prohibited from obtaining Class A licensing as a result of Sec. 5008(f)(7)(C)(ii) of the Act. As drafted, Section 5008(7)(C)(ii) requires a qualified LPTV station to demonstrate that it will not interfere with land

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16 *Waiver of Parts 2 and 90 of the Commission's Rules to Permit New York Metropolitan Area Public Safety Agencies to Use Frequencies at 482-488 MHz on a Conditional Basis*, 10 FCC Rcd 4466 (1995).

17 *Id.* ¶ 16.

> mobile radio services operating on Channel 16 in New York City in order to obtain the Class A license. However, in 1995, the Commission authorized public safety agencies to use Channel 16 in New York City on a conditional basis pursuant to a waiver of the Commission's rules. The Order granting that waiver specifically stated that the low power television station on Channel 17 would not have any responsibility to protect land mobile televisions on adjacent Channel 16. Do you agree with my understanding of Section 5008(f)(C)(ii), namely that this section is not intended to prevent that low power station's qualification for the Class A license?
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> Mr. HATCH. Yes, it is also my understanding that the low power station on Channel 17 in New York City should not be precluded from the Class A license due to Section 5008(f)(7)(ii). The interference that is currently permitted by the Commission is intended to continue. Is this also your understanding, Senator Moynihan?
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> Mr. MOYNIHAN. Yes, it is. Otherwise, the Channel 17 LPTV station in New York City will be permanently deprived of a Class A license, notwithstanding the fact that it exemplifies exactly the type of low power station that should have the opportunity to achieve Class A status. WEBR(LP) has a demonstrated strong commitment to the local Korean community in New York, providing locally originated programming 24 hours a day, 7 days a week. This station's worthwhile service to the community has been a benefit to the public good, and this legislation should not thwart such service from continuing.[18]

Based on this legislative history, the Commission correctly proposes in the *Notice* to interpret Section 5008(f)(7)(C)(ii) to except station WEBR(LP) "from the requirement to show interference protection to use of Channel 16 in the New York City metropolitan area."[19]

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18 CONG. REC. S14989 (November 19, 1999).

19 *Notice* ¶ 40.

K Licensee supports this interpretation. It is consistent with Congress' intent that only objectionable interference should count against an applicant for a Class A license. Moreover, this interpretation retains the intended meaning of Section 5008(f)(7)(C)(ii) to protect Channel 16 land mobile users against any other present or future objectionable LPTV interference in the New York area.

IV CONCLUSION

Due to intense spectrum demands in urban areas, urban LPTV stations such as WEBR(LP) face acutely precarious futures if they are unable to obtain the interference protections available through Class A primary status. Consistent with the Commission's Rules and the spirit of CBPA, K Licensee urges the Commission to reach two important conclusions: (1) LPTV-to-LPTV interference should preclude a licensee from attaining Class A status only if that interference is objectionable; and (2) only objectionable interference should be counted under Section 5008(f)(7)(C)(ii). WEBR(LP) should not be precluded from attaining Class A primary status, and the interference that is currently permitted by the Commission should not be counted against its Class A application.

Respectfully submitted,

K LICENSEE INC.

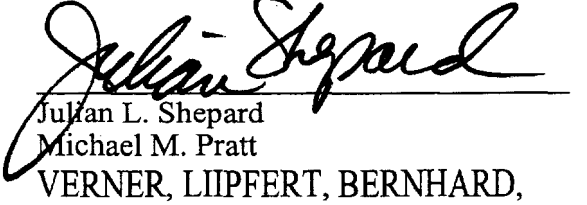

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Exhibit A

Mr. Chairman, section 1005 of that Act would have provided that the principles of section 482 should be used to determine whether transactions between tax-exempt organizations and related non-exempt entities give rise to unrelated business income tax. This provision was needed to insure that legitimate arms length transactions between these entities are not penalized.

Unfortunately, it appears that this session will end without our having another opportunity to once again enact this vitally needed protection for the tax exempt community. As a result, I would like to ask the distinguished Chairman whether he would agree that this provision should be included as a high priority in the first tax vehicle that we adopt in the second session.

Mr. ROTH. I can assure the distinguished Senator that the enactment of this provision, which has already been agreed to by both the House and Senate, is a high priority for our next tax bill.

Mr. NICKLES. I want to join my distinguished colleague from Iowa in his remarks, and also thank our distinguished Chairman for his commitment to enact this provision next year. Tax exempt organizations provide critical services to our communities, and this provision will make it far easier for them to continue to perform these important functions.

Mr. ROTH. I look forward to working with both the Senators from Iowa and Oklahoma next year to provide the relief that this provision would give to the many fine exempt organizations that are awaiting its enactment.

NURSE ANESTHETISTS

Mr. HARKIN. In 1994, the Health Care Financing Administration issued a draft regulation deferring to State law on the issue of physician supervision of certified registered nurse anesthetists (CRNA's). This action was followed in 1997 by a proposed HCFA rule deferring to State law on this issue. HCFA's rule has been subject to great scrutiny and numerous studies. Nevertheless, HCFA has to date failed to issue its final rule on the matter, and defer this issue to State law. Would the distinguished Chairman of the Senate Labor, Health and Human Services, and Education Appropriations Subcommittee agree with this assessment?

Mr. SPECTER. I agree with my distinguished colleague, the ranking subcommittee member. States should have the authority to regulate CRNA's in the same manner as States regulate other health care providers. There is a wealth of information already in existence that supports the view that the issue of supervision should be left to the States, just as HCFA has proposed.

Mr. HARKIN. Therefore, we agree that HCFA's proposed rule has been extensively researched and that HCFA should move forward expeditiously.

Mr. GORTON. I join with my distinguished colleagues to agree that HCFA should move forward expeditiously to resolve this issue.

Mr. SPECTER. Absolutely, HCFA should do what it has initially proposed several years ago and defer to State law on this issue.

Mr. GORTON. I thank the Senators. I look forward to working with them both to resolve this matter.

Mr. HOLLINGS. As you know, I initially objected to the movement of this legislation because of my concerns about the manner in which it preempted state law. As introduced, this bill would have nullified any ability of state legislatures to adopt the Uniform Electronic Transactions Act, (UETA), in a manner that varied from the provisions of the bill, or in a manner that reserved the right of states to adopt UETA in conformance with their consumer protection laws. When the bill was reported by the Commerce Committee, provisions were included to provide states this flexibility. Since the reporting of the bill, the preemption language has been amended to provide that to avoid adherence to the federal law, a state must adopt UETA "in the form, or any substantially similar variation" as provided to the states by the National Conference on Uniform State Law.

Do you agree that notwithstanding this change, the purpose and intent of the preemption provisions, either pursuant to the definitions in the bill or otherwise, have not changed? And that the legislation, in its current form, is intended to permit states the flexibility of adopting and enacting UETA in a manner and form that ensures its conformance with state consumer protection laws?

Mr. ABRAHAM. Yes, Senator Hollings, that is certainly the intent of the legislation in its current form, but I would note that there must be a modicum of common sense involved in this approach. It is expected that states will pass consumer protection provisions in conjunction with the Electronic Transactions Act. It is important, however, that states not use the heading of "consumer protection" to enact changes which are inconsistent with the spirit of UETA and which threaten to undermine the uniformity which UETA is intended to convey. I believe the current language realizes these important goals.

Mr. HOLLINGS. I would like to address another change to the bill since its reporting by the Committee. As you know, the legislation has been amended to incorporate language providing that the bill applies to the business of insurance. This language has the effect of permitting the validation of insurance contracts pursuant to electronic commerce. As you know, state insurance commissioners have expressed reservations about this provision. There is concern that the provision could potentially adversely affect the ability of states to maintain their full regulatory authority over these transactions. Do you agree that insurance companies that enter into agreements via electronic commerce are still required to meet all other state insurance regulatory requirements?

Mr. ABRAHAM. I agree wholeheartedly. The purpose of this section is to permit insurance companies to use electronic signatures in the same manner and extent as other market participants. Under no circumstances is the legislation intended to allow insurance companies to evade state insurance regulations.

Mr. BURNS. As the sponsor of the low power television provisions contained in the Intellectual Property and Communications Omnibus Reform Act of 1999, I would like to take this opportunity to clarify one of the provisions. Specifically, I want to ensure that a qualified low power television (LPTV) station in New York City serving the Korean-American community on Channel 17 (WEBR(LP), formerly W17BM) is not prohibited from obtaining Class A licensing as a result of Sec. 5008(f)(7)(C)(ii) of the Act.

As drafted, Section 5008(7)(C)(ii) requires a qualified LPTV station to demonstrate the it will not interfere with land mobile radio services operating on Channel 16 in New York City in order to obtain the Class A license. However, in 1995, the Commission authorized public safety agencies to use Channel 16 in New York City on a conditional basis pursuant to a waiver of the Commission's rules. The Order granting that waiver specifically stated that the low power television station on Channel 17 would not have any responsibility to protect land mobile televisions on adjacent Channel 16. Do you agree with my understanding of Section 5008(f)(C)(ii), namely that this section is not intended to prevent that low power station's qualification for the Class A license?

Mr. HATCH. Yes, it is also my understanding that the low power station on Channel 17 in New York City should not be precluded from the Class A license due to Section 5008(f)(7)(ii). The interference that is currently permitted by the Commission is intended to continue. Is this also your understanding Senator Moynihan?

Mr. MOYNIHAN. Yes, it is. Otherwise, the Channel 17 LPTV station in New York City will be permanently deprived of a Class A license, notwithstanding the fact that it exemplifies exactly the type of low power station that should have the opportunity to achieve Class A status. WEBR(LP) has a demonstrated strong commitment to the local Korean community in New York, providing locally originated programming 24 hours a day, 7 days a week. This station's worthwhile service to the community has been a benefit to the public good, and this legislation should not thwart such service from continuing.

THE SCOPE OF COMPULSORY LICENSES FOR TELEVISION BROADCAST SIGNALS

Mr. HATCH. Mr. President, the measure before us contains some technical amendments to various provisions of the Copyright Act, including sections